IN THE

Supreme Court of the United States

October Term, 1949

No. 513

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property of Yokohama Specie Bank, Ltd., in the State of New York,

Petitioner,

against

BANQUE MELLIE IRAN,

Respondent.

BRIEF OF BANQUE MELLIE IRAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

ALLEN T. KLOTS,
Attorney for Respondent,
Banque Mellie Iran,
40 Wall Street,
New York 5, N. Y.

MERRELL E. CLARK, JR.,
Of Counsel.

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Opinions and Orders Below.

The opinion below is reported at 299 N. Y. 139 (R. 351); motion for reargument denied 300 N. Y. 459 (R. 364). The remittitur of the Court of Appeals appears at page 354 of the Record, and an amendment thereto at page 356. The Appellate Division of the New York Supreme Court rendered no opinion (see 274 App. Div. 768 (R. 348)). The opinion of the Supreme Court, County of New York, is reported in 188 Misc. 346 (R. 322).

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of June 25, 1948 (C. 646, 62 Stat. 929, 28 U. S. C., Section 1257).

Statutes Involved.

The statutes claimed by the petitioner to be involved are Section 5(b) of the Trading with the Enemy Act, as amended [50 U. S. C. App., § 5(b)]; Executive Order No. 8389, as amended (3 Code Fed. Reg., Cum. Supp. 1943, p. 645), and the rules and regulations issued pursuant thereto; and Section 606-4(a) of the Banking Law of the State of New York. Copies of the provisions of these Acts and amendments referred to in the petition and briefs are contained in an appendix to this petitioner's petition in the case of *Bell* v. *Singer*, which he filed concurrently with his petition in this case.

Questions Presented.

The sole question presented in this case is whether, in view of Executive Order No. 8389, the Court of Appeals erred in holding that the plaintiff's claim was entitled under the provisions of Section 606-4(a) of the Banking Law of the State of New York to preferential payment subject to the procurement of an appropriate Federal license.

We take issue with the petitioner when he describes the question presented as follows:

> "does Presidential Executive Order No. 8389 (the Freezing Order) issued pursuant to Section 5(b) of the Trading with the Enemy Act of October 6, 1917 and the rules and regulations issued pursuant thereto prevent the accrual or creation of a claim *predicated upon a transaction prohibited by such Order*, and render such claim void?" Petition, page 2. (Italics supplied.)

The Court of Appeals did not hold that the accrual or creation of a claim could be "predicated upon a transaction prohibited by such Order", but expressly refused to do so. When the petitioner moved to amend the remittitur of the Court of Appeals to show that a Federal question was involved, he included these words in his proposed amendment. The Court of Appeals, however, in granting an amendment, omitted these words (R. 356), thus indicating that it was not relying on any prohibited transaction in holding that respondent's claim was entitled to preferential payment upon the procurement of a Federal license.

Statement.

Respondent is the central bank of Iran. It has recovered a judgment in the Court of Appeals of the State of New York to the effect that it has a preferred claim in the amount of $112,205.30 against the assets of The Yokohama Specie Bank, Ltd. in the State of New York which are now in the hands of petitioner, the Superintendent of Banks of the State of New York, as liquidator. The judgment expressly provides that payment of this claim is "subject to the provisions of the Executive Order of the President of the United States No. 8389, as amended"—*i. e.*, subject to the issuance of a license (R. 9).

The validity of plaintiff's claim against The Yokohama Specie Bank, Ltd. is not disputed. The sole question involved in the litigation was whether it is entitled to a preference under the New York statute in the New York liquidation proceeding. The New York State Banking Law, Section 606-4(a), provides that a claim against a foreign banking corporation in liquidation shall be preferred against the New York assets of such corporation if it be one "arising out of transactions" had by the claimant with the New York

agency of such foreign banking corporation. All the New York courts which heard the case—that is to say, the Supreme Court Special Term, the Appellate Division First Department, and the Court of Appeals—have held unanimously that the respondent's claim answered the description required by the statute. The Court of Appeals modified the judgment of the courts below by eliminating all provision for interest, but we are not concerned with that on this petition. This matter is dealt with in our cross petition heretofore filed. The Court of Appeals in other respects affirmed the judgment.

These proceedings took place in the New York courts because, on the outbreak of war with Japan, the petitioner as liquidator took over the New York assets of The Yokohama Specie Bank, Ltd. under the New York statute, and the Alien Property Custodian chose not to vest these assets in so far as they were required to satisfy claims entitled to a preference under New York law [Vesting Order No. 915 (R. 201, 191)]. The Alien Property Custodian permitted petitioner to continue his liquidation and administration of these assets [see Supervisory Order No. 27 (R. 198-200, 191); also letter dated September 28, 1942 (R. 242-244, 237-238)].

The Alien Property Custodian was made a party to this action, served with the complaint, and given an opportunity to appear; but he notified respondent's counsel that he did not choose to appear, and a stipulation was entered discontinuing the action as to him. A representative of the Attorney General appeared for the Office of Alien Property as *amicus curiae* and argued against the contentions of respondent in the Court of Appeals. No brief, as far as we have been able to ascertain, has been filed by the Attorney General or the Office of Alien Property as *amicus curiae* on this petition.

The Facts.

The facts underlying the Banque Mellie claim may be briefly stated.

In the first half of 1941 respondent Banque Mellie Iran (through its correspondent in New York, Irving Trust Company) paid numerous sums aggregating $117,162.27 to the New York Agency of The Yokohama Specie Bank, Ltd. (R. 23). These sums were all paid prior to July 26, 1941, the date on which the freezing order—Executive Order No. 8389—became applicable to Japanese assets, in order to support certain credits opened simultaneously in Japan (R. 24, 160-161). These credits were opened by cables from Teheran to the various branches of The Yokohama Specie Bank in Japan and were to be drawn upon by shippers in Japan who had sold goods to Iranian customers (R. 161). These credits were to expire on a date fixed, "with the proviso that the unused balances were to be returned to plaintiff", as the Court of Appeals found (R. 351; 299 N. Y. 139, 142). With the exception of $1,000, none of these credits was utilized prior to their expiration dates (R. 161).

Thereafter, subsequent to July 26, 1941, the branches of The Yokohama Specie Bank in Japan sent a series of cables to the New York branch, instructing the latter to repay respondent certain of these sums, amounting in all to $112,205.30 (R. 142-155, 42) and the New York Agency of The Yokohama Specie Bank, on or about December 2, 1941, notified Irving Trust Company, the representative of respondent in New York, that it had been instructed to repay these sums provided a license from the Treasury Department should be procured (R. 36-37, 25-26). No further transactions took place, and no entries were even made on the books of the New York Agency as a result of this correspondence (R. 264). Because Japanese funds by that time had become frozen, payment could not be made without a license.

Before a license could be obtained, war broke out between this country and Japan, and on December 8, 1941, the Superintendent of Banks of the State of New York took possession of the New York assets of The Yokohama Specie Bank pursuant to the New York statute (R. 207, 215).

After the petitioner Superintendent of Banks had taken possession of these assets, respondent Banque Mellie Iran filed a claim with him asserting that its claim was entitled to be preferred by reason of the fact that the statute gave preference to claims "arising out of transactions" with the New York Agency and that respondent's claim arose out of such a transaction (R. 245-249). Petitioner, the Superintendent of Banks, rejected the claim. Thereupon respondent instituted this litigation in the State of New York and on motion for summary judgment, judgment was entered in favor of the respondent to the effect that it was entitled to preferential payment out of these assets, the payment to be subject to the provisions of the Executive Order of the President of the United States No. 8389, as amended (R. 9). The Court of Appeals has now affirmed the judgment to that effect.

The Banque Mellie Iran is wholly owned by the government of Iran. Iran was not an enemy during the war, but became an ally of the United States. Respondent Banque Mellie Iran was never a blocked national.

The Relation of This Case to *Bell* v. *Singer*.

Petitioner in his petition, at page 11, asserts that the Federal question presented by by this case is identical with that presented in the case of *Bell* v. *Singer*, and for argument refers to his petition in the *Singer* case filed concurrently with his petition herein. Although the *Singer* case and the case at bar have certain features in common which

the Court of Appeals held entitled both claims to a preferential status, we urge the Court to bear in mind that the case at bar contains certain additional features which are not present in the *Singer* case and which have a very important bearing on the underlying basis of this claim. In this case as distinguished from the *Singer* case the transactions by which The Yokohama Specie Bank, Ltd. became indebted to the Banque Mellie Iran took place before the freeze, in dealings with the New York Agency here in New York. When these monies were deposited in New York in the first half of 1941 (R. 24, 160), there arose the obligation on the part of The Yokohama Specie Bank, Ltd., as the Court of Appeals has found, to refund them in case the credits which were to be opened were unutillzed. These transactions, which took place before the impact of the Trading with the Enemy Act upon any dealings with the Japanese, formed a vital component in the course of dealing which culminated in the notice given by the New York Agency on December 2, 1941 to the Irving Trust Company that it had been instructed to repay these monies (R. 36-37, 25). This course of dealing the Court of Appeals found constituted a transaction with the New York Agency within the New York statute, entitling the claim to preferential payment subject to the procuring of an appropriate license.

Summary of Argument.

1. In view of the fact that the Court of Appeals expressly conditioned the payment of respondent's claim on obtaining a license from the Federal authorities, no special or important reasons justify the issuance of a writ of certiorari in this case.

2. The decision of the New York Court of Appeals on the question presented is not in conflict with any decisions of this Court.

POINT I.

In view of the fact that the Court of Appeals expressly conditioned the payment of respondent's claim on obtaining a license from the Federal authorities no special or important reasons justify the issuance of a writ of certiorari in this case.

It will be recalled that the judgment granted by the New York courts in this case is to the effect that respondent is entitled to preferential payment of its claim from the New York assets "subject to the provisions of Executive Order of the President of the United States No. 8389, as amended"—that is to say, subject to the procuring of an appropriate license from the Federal authorities (R. 9). The effect of the decision of the Court of Appeals is thus to leave with the proper Federal authorities all control over the payment of respondent's claim and over the assets against which that claim is made. Since the Court of Appeals has held that an appropriate Federal license must be procured before respondent is entitled to payment, the Court of Appeals has for all practical purposes said no more than that the transactions out of which respondent's claim arose would under New York law entitle respondent to preferential payment in the absence of any prohibitions contained in the freezing order. This is what the Federal authorities, acting under the Trading with the Enemy Act and Executive Order in effect left to the New York courts to determine when they chose not to vest the assets required to meet preferential claims (R. 201, 191). Since respondent cannot get payment until a license is obtained, the question of the effect of the freezing order is left with the Federal authorities.

Indeed, whatever decision might be rendered by this Court were it to grant certiorari here, that decision, in view of the issue presented, would in itself be little more than an academic pronouncement. Respondent will not, on the present state of the record, be paid any money until the Federal Government has authorized that payment. Full control is retained by the Federal authorities. For practical purposes this Court is being asked to decide a question which is moot.

In addition, it must be apparent that the facts which the Court of Appeals found as qualifying this claim for a preferential status were transactions which were not forbidden by the Trading with the Enemy Act. We have already pointed out in this brief that the transactions with which this claim originated—namely, the payment of these monies in New York "with the proviso that the unused balances were to be returned to plaintiff", as the Court of Appeals found (R. 351; 299 N. Y. 139, 142)—occurred prior to July 26, 1941 before the freeze. They therefore were not affected by the Trading with the Enemy Act or the Executive Order (R. 23-24, 160-161).

Likewise, none of the events which occurred after the freeze were forbidden by the Trading with the Enemy Act or the Executive Order or were in contravention of its policy. Neither the Trading with the Enemy Act nor the Executive Order forbade the offices in Japan to request the New York Agency to refund these monies to respondent (see cables, R. 142-155, 42). Neither the Trading with the Enemy Act nor the Executive Order forbade the New York Agency to inform plaintiff, through the Irving Trust Company, that the monies would be paid upon procuring a license. It will be recalled that the letter of December 2, 1941 from the New York Agency to the Irving Trust Com-

pany specifically stated that these monies would be paid only "provided we are authorized by the Treasury to do so" (R. 36, 25). This proviso itself proves that no violation of the Executive Order was attempted or contemplated. No title to any property or claim was passed or sought to be passed by these acts. No transfer of credit resulted from these acts. It is undisputed that no credit was ever received or accepted by the New York Agency from the Japanese offices with respect to the instructions that were sent from Japan; that no entry was made on any book of the New York Agency; that the telegraphic instructions were revocable; and that at no time were any monies earmarked for this purpose. These facts all appear in affidavits submitted by the petitioner herein, both in the case at bar and in the *Singer* case (see affidavit of Frank Kearns in the case at bar, R. 263-264).

The Court of Appeals merely held that these acts which took place after the freeze formed part of the chain of events which qualified the claim as one arising out of transactions with the New York Agency within the requirements of the statute. That the Court of Appeals did not rest its decision on any prohibited act is corroborated, as we have heretofore pointed out (pp. 2-3, *supra*), by its refusal to find in the remittitur that the accrual or creation of the claim in question was "predicated upon a prohibited transaction".

Since these transactions were by their terms and *at the time* made subject to a license, and since the decision of the Court of Appeals still makes their consummation subject to a license, no provision of the Trading with the Enemy Act or the Executive Order can possibly be said to be violated.

POINT II.

The decision of the New York Court of Appeals upon the question presented is not in conflict with any decisions of this Court.

Petitioner states that the primary reason for granting a writ of certiorari is that the decision of the New York Court of Appeals is in direct conflict with the decisions of this Court. He here cites the cases of *Propper* v. *Clark*, 337 U. S. 472 (1949), and *McGrath* v. *Manufacturers Trust Company*, 94 L. Ed. 10 (1949). (See pp. 12-24 of his petition in the *Singer* case.) As to the latter case he seems to rely solely on a footnote contained in the case, which seems to us to be so inconclusive as to have no significance and to require no argument.

The *Propper* case is clearly distinguishable from the case at bar. There this Court held that after a freeze under the Trading with the Enemy Act, title to property frozen could not be passed without a license to a State receiver on his appointment by a State court. It is to be noted that in the *Propper* case the New York State court in its order appointing the permanent receiver directed the transfer of the claim to the receiver. This Court in its opinion at least twice pointed this out (337 U. S. 472, at 479, 480). We thus have an affirmative act forbidden by the Executive Order, attempted to be done after the freeze, and this Court held that the mere fact that it was done by a New York court did not make it legal when the higher authority had forbidden such an act. It is abundantly clear from the opinion that this Court in that case was concerned only with preventing the unlicensed passing of title to property which had been already blocked, whether the per-

son who assumed to pass the title was the individual owner or a State court. The court took pains to point out that its decision was limited to this narrow question. Mr. Justice Reed said at page 486:

> "We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this."

The question of title which was involved in the *Propper* case was of more than academic interest. On the question of title depended the power of the Alien Property Custodian to vest the assets involved. Thus, in that case, the prohibitions against payment without a license did not protect the interests of the Federal Government, as this Court pointed out (pp. 482-484). In the case at bar, however, no question of title was involved, and the decision of the Court of Appeals has no effect on the power of the Alien Property Custodian to vest these assets.

Petitioner in his petition points to a sentence in the opinion of this Court in the *Propper* case as indicating that this Court understood that a question of title was involved in the *Singer* case and that this Court disagreed with the Court of Appeals' disposition of that question (Petition in the *Singer* case, p. 21). The sentence in this Court's opinion in the *Propper* case to which he refers is as follows:

> "We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor" (p. 484).

We believe that this Court, with the record of the *Singer* case now before it, will recognize that the decision of the Court of Appeals in that case did not involve a holding that "title to blocked assets could pass without license" from the Superintendent of Banks to a creditor. No such holding was involved in the *Singer* case or in the case at bar. The Court of Appeals in the first *Singer* case, as in the second, merely held that in interpreting the New York statute the transactions involved fulfilled the requirements of the New York statute and entitled the claims to preferential payment when a Federal license should be procured. The Court of Appeals in the *Singer* case did not hold that title to any property had been transferred from the petitioner or put out of reach of the Alien Property Custodian or any other Federal authority acting under the Trading with the Enemy Act. The decision of the Court of Appeals did not involve any decision affecting title which would have prevented the Alien Property Custodian from vesting any of the assets involved if he had elected to do so. This is made doubly clear by the Court of Appeals' holding that any payment of this claim was subject to a license from the Federal authorities.

In support of its interpretation of the holding of the *Singer* case, this Court cites in a footnote (at p. 484) the following language of the Court of Appeals in its opinion in the *Singer* case:

> "The fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay. (See United States Treasury Department, General Rule No. 12(4) under Executive

Order No. 8389 as amended; also *Feuchtwanger* v. *Central Hanover Bank*, 288 N. Y. 342.)"

Not having the full record of the *Singer* case before it in the *Propper* case, this Court apparently understood the above quoted language to mean that title to blocked assets was passed from the Superintendent to the plaintiff. In fact, however, the quoted language was not addressed to the effect which Executive Order No. 8389 had on title to any claim or property. It was merely addressed to the Superintendent's argument that the claim was a contingent claim because it could not be paid without a license, and, being contingent and not certain, was therefore not provable in the liquidation proceeding. The Superintendent had pleaded as an affirmative defense in his answer to the complaint in the *Singer* case that because of the licensing requirements the claim of plaintiff was "uncertain and contingent" and was therefore not a provable claim (Singer, R. 21). The Court of Appeals was answering this contention in its above quoted language. Its holding was simply that the claim was not contingent and therefore unprovable merely because of the existence of the licensing requirement as to payment. The Court's language was not intended to imply that any title or interest could in fact be transferred without a license.

Petitioner cites without discussion certain cases in the lower Federal courts. None of these cases involves questions similar to the one presented here.

It is submitted, therefore, that the decision of the Court of Appeals in the case at bar is not in conflict with any decision of this Court, and gave full and proper recognition to the effect of applicable Federal statutes and Executive Orders.

Conclusion.

There is no special or important reason justifying a review by this Court, in view of the power which the Federal authorities still retain over respondent's claim, as a result of the decision of the Court of Appeals. The decision of the Court of Appeals is not in conflict with any decisions of this Court or with any Federal statutes or Executive Orders. The petition should be denied.

Respectfully submitted,

ALLEN T. KLOTS,
Attorney for Respondent;
Banque Mellie Iran,
40 Wall Street,
New York 5, N. Y.

MERRELL E. CLARK, JR.,
Of Counsel.